Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2094

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JOHN C. WEAVER, JR., M.D. and
BMA OF OAKLAND, INC.,
Petitioners,

VS.

BRENDA MARIE PAYTON,
Respondent.

REPLY BRIEF OF PETITIONERS

CHARLES F. BOND, II
COUNSEL OF RECORD
CHARLES BOND
PROFESSIONAL LAW CORPORATION
240 Stockton Street, Suite 500
San Francisco, California
94108
Telephone: (415) 956-0575
Attorneys for Petitioners

MARK I. SCHICKMAN
MARRS A. CRADDICK
Of Counsel

TABLE OF CONTENTS

Page

I. Certiorari Should Be Granted In This Case Because, Constitutionally, The California Court Failed To Adopt The Least Drastic Means Of Achieving Its Objective, But Instead Adopted The Most Drastic Means— The Conscription Of Private Persons Into The Involuntary Personal Service Of Another 1

II. Respondent's Brief Does Not Deny Her Aberrant, Disruptive And Dangerous Behavior 5

Conclusion 8

TABLE OF AUTHORITIES

Cases

Page

Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959).....8

Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973).....2

Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 (1961).....8

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).....3

Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).....8

Statutes And Administrative Opinions

California Probate Code sections 1800-2752.....3

California Welfare & Institution Code sections 5357, 5358.....3

60 Cal. Ops. Atty. Gen. 375 (1977).....3

No. 80-2094

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JOHN C. WEAVER, JR., M.D. and
BMA OF OAKLAND, INC.,
Petitioners,

vs.

BRENDA MARIE PAYTON,
Respondent.

REPLY BRIEF OF PETITIONERS

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE, CONSTITUTIONALLY, THE CALIFORNIA COURT FAILED TO ADOPT THE LEAST DRASTIC MEANS OF ACHIEVING ITS OBJECTIVE, BUT INSTEAD ADOPTED THE MOST DRASTIC MEANS—THE CONSCRIPTION OF PRIVATE PERSONS INTO THE INVOLUNTARY PERSONAL SERVICE OF ANOTHER

Respondent's brief does not offer a single word to refute or contest petitioners' contention that the

California Supreme Court has bound Dr. John C. Weaver, Jr. and BMA of Oakland, Inc. into involuntary servitude in violation of the Thirteenth Amendment. Instead, without citing any supporting constitutional law whatsoever, respondent urges this Court to balance her interests against Dr. Weaver's. [RB, p. 13.]

Balancing, however, is not the proper test to be applied where the result is an infringement of constitutionally protected rights. As stated in *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973):

> [E]ven when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty. . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that broadly stifles the exercise of fundamental personal liberties.

Thus, if the State of California has an interest in arranging for Ms. Payton's dialysis pending her appeal,[1] then the State must adopt the *least drastic means* of doing so.

At the time it made its order, however, the California Supreme Court did not explore any less drastic alter-

---

[1] The only State interest expressed in the California order is the preservation of the court's jurisdiction.

natives. For example, the California court had before it a declaration showing that an inpatient drug therapy program in nearby Marin County had agreed voluntarily to admit Ms. Payton for treatment of her drug abuse; as a part of that inpatient care, the medical director of the drug program had specifically arranged for Ms. Payton's dialysis.[2] (See Appendix A, *infra*.)

In addition to the Marin alternative, respondent had, and continues to have, the option of voluntarily petitioning the State of California for a conservatorship of the person. (Cal. Prob. Code §§ 1800-2752.) Under California law, such a petition for conservatorship is the proper means for arranging medical care when a person is unable to do so him or herself. (Cal. Welf. & Inst. Code §§ 5357, 5358, 60 Ops. Atty. Gen. 375, 381 (1977).)

While it is not Dr. Weaver's or BMA's burden to demonstrate how a conservator of the person would have the power or influence to arrange for Ms. Payton's care [RB, p. 11-12], it is obvious that such a conservator would have authority to deal with *all* of Ms. Payton's problems—especially her personality disorders and drug addiction. For example, a conservator could follow through with placing Ms. Payton in a drug program, such as the Marin

---

[2] Unfortunately, after the California Supreme Court issued its order, Ms. Payton had no incentive to pursue this drug therapy program and so abandoned it.

inpatient therapy program mentioned above. Dr. Weaver, on the other hand, has no such power to secure Ms. Payton's cooperation in her care. It is submitted, therefore, that a conservatorship of the person would be in the best overall interest of Ms. Payton and would also be the least drastic means of achieving the State's objective of preserving the court's jurisdiction while Ms. Payton pursues her appeal from the judgment against her.[3]

As is evident from the availability of these alternatives, this is not a case which pits one person's life against another's freedom. Nor is this a case (as respondent tries to suggest) of a poor, black woman being abused by a physician who is allegedly not fulfilling his obligations under the Hippocratic Oath. [RB, p. 16.] Such irresponsible personal attacks on this physician are wholly inappropriate and completely unsupported by the facts.[4] To the contrary, the trial court observed that Dr.

---

[3] Contrary to respondent's brief at page seven, respondent has never filed a single document in court to gain admission to a mental hospital. When implored by both the trial and appellate justices to seek a voluntary conservatorship, her response was essentially that she did not wish to do so. Should petitioners lose their Thirteenth Amendment rights simply because respondent does not elect to exercise her voluntary alternatives?

[4] One of many examples of respondent's misrepresentations may be found at RB p. 15, where she alludes to Dr. Weaver's absence from the country "on a vacation for two and one half months last fall." Dr. Weaver spent that (continued)

John Weaver was:

> in fact sensitive to [Ms. Payton's] needs, that he has attempted to assist her to the best of his medical abilities, and that he continues to have concern for her as a person and has continued to serve her medical needs.

The trial judge concluded: "The man has the patience of Job."

II. RESPONDENT'S BRIEF DOES NOT DENY HER ABERRANT, DISRUPTIVE AND DANGEROUS BEHAVIOR

Respondent admits at page three of her brief, "that she has emotional problems, . . . [and] a long history of drug abuse." Neither respondent's brief nor the lower court's order addresses this overriding fact. Instead, Ms. Payton's brief tries to shift the responsibility for the consequences of her own behavior to others. The result is a string of contradictions in her brief. For example, at page four, she alleges that Dr. Weaver "made no affirmative efforts whatsoever to assist [Ms. Payton] in getting other dialysis treatment;" yet one page later, she describes such affirmative efforts, narrating his consultation with two other local dialysis units who concluded, as Dr. Weaver has, that they should not accept Ms. Payton as a patient because "it would not be in her best interest or

---

"vacation" in Thailand treating Cambodian refugees.

that of their other patients." [RB, p. 5.] Similarly, at page seven of her brief, she acknowledges her own "notoriety" in the dialysis community, which obviously is derived from her own behavior, over which Dr. Weaver has no control.

The inability of anyone—except a conservator—to supervise Ms. Payton's behavior makes the lower court's order totally unworkable.[5] The California courts simply failed to address the central and most crucial problem in this case: how to deal with the uncooperativeness of this patient.

---

[5] The unworkability of this order is well illustrated by the present deteriorating treatment situation. What respondent characterizes as "virtually (having) to submit to incarceration" (RB, p. 16) is, in fact, Dr. Weaver's standing order that Ms. Payton remain for ongoing treatment as an inpatient in the hospital, where she will not have access to street drugs, will be fed a monitored and proper diet, and will be available for regularly scheduled dialysis. As in the past, however, she refuses to cooperate with the doctor's orders. She walks out of the hospital against medical advice and returns at her whim for treatment, expecting Dr. Weaver to be on call any time of the night or day to provide treatment whenever she wants it. During her absences, she continues to abuse drugs, indulge her dietary indiscretions, and procrastinate in seeking dialysis, all of which combine to complicate her care. She also continues to be as disruptive in the hospital as she was in the outpatient unit. Clearly, this arrangement cannot continue for the many years it will take to resolve her underlying appeal.

Indeed, this Petition for Certiorari stems from a totally illogical and contradictory set of orders by the trial court. On June 19, 1980, the trial court issued its judgment properly supported by findings of fact and conclusions of law, and found no legal or equitable basis for compelling petitioners to resume Ms. Payton's treatment. Yet on June 30, 1980, the trial court issued its post-judgment order compelling just such treatment pending appeal.

— How can a trial court find one day that Ms. Payton's behavior is so extreme and dangerous "as to trespass upon the rights of other patients," then the next day order that trespass to continue for the next several years?

— How can a trial court specifically find that no doctor-patient relationship existed, then turn and order the involuntary establishment of such a relationship, calling it a preservation of the "status quo"?

— Most importantly, how can the trial court make a specific finding in support of the judgment that Ms. Payton "is not without means to arrange for her own care," and then ignore those alternative means by ordering petitioners to provide respondent's care against their will?

The trial court's vague and general statement in its post-judgment order that Ms. Payton will die without dialysis is not sufficient to support the involuntary

servitude of petitioners. There must be an additional showing that less drastic means to secure that dialysis—short of conscripting a private citizen into involuntary servitude—have been considered and exhausted. No such showing was made and none can be presumed.[6] In short, the California courts have made a terrible mistake, which only this Court can undo.[7]

CONCLUSION

This case presents more than a distant struggle between a physician and the State of California over the forced treatment of a patient. This case poses a classic confrontation between the inalienable freedom of an individual and the power of the State.

As society becomes more and more accustomed to governmental intrusion and control in daily life, and as courts become more and more "creative" in fashioning solutions to problems before them, there is the constant temptation to let socially "good intentions" override the

---

[6] Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Skinner v. Oklahoma, 316 U.S. 535, 544, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Poe v. Ullman, 367 U.S. 497, 545, 81 S.Ct. 1752, 6 L.Ed 2d 989, Harlan, J. dissenting (1961).

[7] The California Supreme Court's order is contrary to the established state law governing patient-physician relationships. Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959).

protections of the Constitution. In this case, this Court has the opportunity to send a clear message that no matter how well meaning a State may be, it may not expropriate a particular person's personal service and treat it as a State resource. An individual's labor, skills and abilities cannot be "nationalized" against his or her will. Although we are rapidly approaching 1984, the Orwellian spectre of an all-powerful State must not overtake our perceptions of fundamental freedoms, especially where less drastic means of achieving the State's objectives have not been exhausted.

This nation fought its bloodiest war over the right to be free from the personal service of another. Dr. Weaver is a human being who is not owned by Ms. Payton or by the State of California. Yet, so long as the California Supreme Court's order binds him, he is not free. Under penalty of being sent to jail, he must interrupt the treatment of his other patients, or put down his knife and fork at dinner, or arouse from a sound sleep, to respond to the call of a patient who refuses to abide by any reasonable schedule or regimen;[8] furthermore, in doing so,

---

[8] Obviously, respondent is wrong in arguing that the payment of wages has anything to do with petitioners' rights in this case. (RB, pp. 7-8.) Nor should the Court be misled by respondent's vague argument that this petition is "collateral" to her appeal below. This petition challenges the post-judgment order, whereas her appeal is taken from the judgment against her. Likewise, she (continued)

he must violate the dictates of his best medical judgment by subjecting his other patients to this patient's aberrant and disruptive behavior.

What clearer case cries out for the relief of this Court than that of a man whose daily life, 24 hours a day, is subject to the ringing of a bell that forces him to go to work against his will? Every day that passes continues this State-mandated servitude. Because of the on-going severe violation of such a fundamental individual freedom, petitioners ask this Court to grant certiorari and summarily to reverse the California Supreme Court's order, with directions to the lower court to seek the least drastic means of achieving its objective.

DATED: July 29, 1981.

Respectfully submitted,

CHARLES F. BOND, II
Attorney for Petitioners

MARK I. SCHICKMAN
MARRS A. CRADDICK
Of Counsel

---

represents that her appeal embodies issues of "national public concern" (RB, p. 8), but she never articulates them; indeed, her opening appellate brief below merely challenged three findings of fact, all of which are supported by overwhelming evidence. The only constitutional issue in this case is petitioners' right to be free from involuntary servitude.

APPENDIX A

OAKLAND MEDICAL GROUP
Incorporated
424 Twenty-Eight Street
Oakland, California 94609
(415) 452-4824

[Letterhead]

SUPPLEMENTAL DECLARATION OF
JOHN C. WEAVER, Jr., M.D.

John C. Weaver, Jr., M.D. declares under penalty of perjury the following:

In an effort to locate alternative hemodialysis treatment for Brenda Marie Payton, on February 27, 1981, I telephoned Mr. Gregg Bays, Tamalpais Growth Center, 812 D Street, San Rafael, California, and he advised me that Mrs. Payton could be accepted into the Rehabilitation Program of that organization. Included in the program she would be given rehabilitation treatment for her drug addiction, and also would receive all necessary hemodialysis treatment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of March, 1981, at Oakland, California.

_____
John C. Weaver, Jr., M.D.